Supreme Court, U.S.
FILED
SEP 10 2015
OFFICE OF THE CLERK

No. 14-981

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN. ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF RICHARD D. KAHLENBERG AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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September 10, 2015

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INTEREST OF *AMICUS CURIAE*

Richard D. Kahlenberg is a senior fellow at The Century Foundation, a non-profit, non-partisan research organization founded in 1919.

He is the author of *The Remedy: Class, Race, and Affirmative Action* (Basic Books, 1996), which was described by William Julius Wilson in the *New York Times* as "by far the most comprehensive and thoughtful argument thus far for . . . affirmative action based on class." He is also the editor of three Century Foundation books that address race-neutral affirmative action strategies: *America's Untapped Resource: Low-Income Students in Higher Education* (2004); *Rewarding Strivers: Helping Low-Income Students Succeed in College* (2010); and *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas* (2014). *The New York Times* has identified Kahlenberg as the nation's "leading liberal against affirmative action" and *Diverse Issues in Higher Education* called Kahlenberg "arguably the nation's chief proponent of class-based affirmative action in higher education admissions."[1]

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[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *Amicus Curiae* made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Race-neutral strategies are usually superior to racial preferences in achieving the important educational benefits of racial, ethnic and socioeconomic diversity.

ARGUMENT

I. THE COURT HAS DEFINED DIVERSITY IN EDUCATION BROADLY, YET SELECTIVE COLLEGES AND UNIVERSITIES FOCUS ON RACE AND GENERALLY IGNORE SOCIOECONOMIC DIVERSITY, WHICH CONTRAVENES TWO IMPORTANT LEGAL PRINCIPLES.

A. Court Precedents Emphasize the Benefits of Diversity, Including, But Not Limited to, Race and Ethnicity.

As the U.S. student population experiences dramatic demographic change—and as our society's income inequality continues to rise—promoting racial, ethnic, and economic inclusion at selective colleges has become more important than ever. To be economically competitive and socially just, America needs to draw upon the talents of students from all backgrounds. Moreover, the education of all students is enriched when they can learn from classmates who have different sets of life experiences.

The Supreme Court has recognized that diversity in all of its forms—including racial, ethnic, and socioeconomic—is valuable for two reasons: 1) to improve the education of students and 2) to

demonstrate that pathways to leadership are open to all in a democratic society.

The Court has observed that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."[2] The Court has also noted that "'classroom discussion is livelier, more spirited and simply more enlightened and interesting' when the students have 'the greatest possible variety of backgrounds.'"[3]

In *Grutter v. Bollinger*, the Court recognized a second interest: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." Speaking more expansively, the Court continued, "All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training."[4]

Racial and ethnic diversity contribute to both goals, but so too does socioeconomic diversity. If one is looking for a lively discussion from students with "the greatest possible variety of backgrounds," then including a poor white student from a trailer park might add more diversity than a wealthy African American graduate of a prep school. As one

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[2] *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).
[3] *Id.* at 330.
[4] *Id.* at 332.

University of Pennsylvania Law professor noted, his racially diverse class had "very few students who come from . . . the blue-collar working class. What that means is that no one has any idea what life is like on the other side of the tracks. That leads to a very sterile discussion when it comes to labor law."[5]

Likewise, socioeconomic diversity is highly relevant to promoting the second interest the Court has identified: "All members of our heterogeneous society must have confidence in the openness" of institutions that train our nation's leaders. A racially diverse class that effectively excludes students from families in the bottom half of the socioeconomic spectrum is unlikely to instill "legitimacy in the eyes of the citizenry."

Accordingly, this Court has long recognized that diversity should not be viewed simply as a matter of race and ethnicity. In *Grutter*, the Court pointed out that Justice Powell's *Bakke* opinion was "careful to emphasize that in his view race 'is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.'"[6]

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[5] RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION 171 (1996).

[6] *Grutter*, 539 U.S. at 324.

B. In Practice, Universities Pursue Racial Diversity But Generally Do Not Pursue Socioeconomic Diversity.

Unfortunately, extensive research suggests that selective colleges and universities focus almost exclusively on what Georgetown Law professor Sheryll Cashin calls a superficial "diversity by phenotype" to the exclusion of a richer, more nuanced, emphasis on socioeconomic alongside racial diversity.[7]

Universities have long claimed that they "give significant favorable consideration" to economically disadvantaged students in pursuit of socioeconomic alongside racial and ethnic diversity.[8] But careful empirical research—from three sets of *supporters* of racial affirmative action—suggests that universities do not in fact do so, at least so long as direct racial preferences are available to them.

In a 2004 study of the nation's most selective 146 institutions, Georgetown researchers Anthony Carnevale and Stephen Rose found that race-based affirmative action triples the representation of blacks and Hispanics students compared to admission based on grades and test scores but that universities do

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[7] SHERYLL CASHIN, PLACE NOT RACE xvi (2014).

[8] *See* Brief of Harvard University, Brown University, The University of Chicago, Dartmouth College, Duke University, The University of Pennsylvania, Princeton University, and Yale University as *Amicus Curiae* Supporting Respondents, U.S. Supreme Court in *Grutter v. Bollinger* and *Gratz v. Bollinger*, at 22 n.13.

nothing to boost socioeconomic representation *per se*.[9] In fact, the representation of poor and working class students was slightly lower than if grades and test scores were the sole basis for admissions, the researchers found.[10]

So too, in a 2005 study of highly selective institutions, William Bowen and colleagues found that being an underrepresented minority increases one's chance of admissions by 27.7 percentage points. By contrast, being in the bottom income quartile (relative to the middle quarters) has no positive effect.[11]

Likewise, a 2009 analysis by Thomas Espenshade of Princeton and Alexandria Radford finds that, at highly selective private institutions, the boost provided to African American applicants is worth 310 SAT points (on a 1600 scale) compared with 130 points for poor students, 70 points for working-class applicants, and (incongruously) 50 points for upper-middle class students, relative to middle-class pupils.[12] Low-income white students, meanwhile, are penalized in their chances of

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[9] Anthony P. Carnevale and Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 135 (Richard D. Kahlenberg ed., 2004).

[10] *Id.* at 142.

[11] WILLIAM G. BOWEN, MARTIN A. KURZWEIL, AND EUGENE M. TOBIN, EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 105, Table 5.1 (2005).

[12] THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL 92, Table 3.5 (2009).

admissions compared with more affluent white students holding all other factors constant.[13]

A similar pattern can be found among law schools. A 2011 study found that while schools provide very large preferences to black and Latino students, there is no preference provided to students whose parents have lower levels of education. At the top twenty law schools, 89 percent of African Americans, 63 percent of Latinos (and even higher proportions of whites and Asians) come from the top socioeconomic half of the population. Just 2 percent of students at the top twenty law schools come from the bottom socioeconomic quarter of the population; "low-SES representation at elite law schools is comparable to racial representation 50 years ago, before the civil rights revolution."[14]

Overall, at selective colleges, stratification by class is far greater than stratification by race. In a 2013 report, Anthony Carnevale and Jeff Strohl noted that while white students are overrepresented at selective colleges by 15 percentage points, the overrepresentation of high-income students is 45 percentage points, three times greater.[15] At the most selective institutions, Carnevale and Strohl find that the wealthiest socioeconomic quartile of the

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[13] *Id.* at 98, Figure 3.9.

[14] Richard Sander, *Class in American Legal Education*," 88 DENVER U. L. REV. 631(2011).

[15] ANTHONY P. CARNEVALE AND JEFF STROHL, SEPARATE AND UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 12 (2013).

population has 14 times the representation of the poorest socioeconomic quarter.[16]

Selective colleges have a lack of socioeconomic diversity across racial groups. According to William G. Bowen and Derek Bok's *The Shape of the River*, 86 percent of African American students at selective colleges are middle or upper-class—and the whites are even wealthier.[17] Another study finds that the proportion of black students at elite colleges coming from the top quartile of the socioeconomic distribution increased from 29% in 1972 to 67% in 1992.[18]

While higher education institutions have in the last decade announced a flurry of financial aid initiatives, a 2011 analysis found that the percentage of students receiving Pell grants at the wealthiest fifty institutions remained flat between 2004–2005 and 2008–2009.[19] In 2013, Catharine Hill reported that "only 10 percent of students attending selective colleges and universities came from the bottom 40 percent of the income distribution in 2001, and that little progress had been made by 2008, except at a few

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[16] Anthony P. Carnevale & Jeff Strohl, *How Increasing Access Is Increasing Inequality and What to Do About It*, in REWARDING STRIVERS: HELPING LOW-INCOME STUDENTS SUCCEED IN COLLEGE 137, Figure 3.7 (Richard D. Kahlenberg ed., 2010).

[17] WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 341, Table B.2 (1998).

[18] RICHARD SANDER & STUART TAYLOR, JR. MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT 249, Figure 16.1 (2012).

[19] Beckie Supiano & Andrea Fuller, *Elite Colleges Fail to Gain More Students on Pell Grants*, CHRON. OF HIGHER EDUC., Mar. 27, 2011.

of the very wealthiest institutions."[20] A 2015 report by the University of Michigan's Michael Bastedo observes that the proportion of low-income students at selective colleges has for decades remained virtually unchanged.[21]

C. This Imbalance in Attention to Race and Class Contravenes Two Principles: 1) The Requirement That in Pursuing Racial Diversity, Colleges Should Seek Other Types of Diversity as Well; and 2) The Requirement That Colleges Pursue Race-Neutral Alternatives Before Using Race in Admissions.

The heavy emphasis placed by higher education institutions on racial diversity, and the lack of attention to socioeconomic diversity, is legally problematic in two respects.

First, it suggests that colleges and universities may not be seeking the educational benefits that flow from diversity in the way that the Supreme Court envisioned. Rather than pursuing the educational benefits that derive from students with a variety of racial, ethnic, and economic backgrounds, higher education seems instead focused inordinately on seeking racial representation.

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[20] Catharine Hill, *Improving Socioeconomic Diversity at Top Colleges and Universities*, HUFFINGTON POST, Apr. 5, 2013.

[21] Michael Bastedo, *Enrollment Management and the Low-Income Student* 1 (American Enterprise Institute, Aug. 4, 2015); Paul Fain, *Conference and new research takes a broader look at the college match challenge*, INSIDE HIGHER ED, Aug. 5, 2015.

Second, the fact that wealthy students are 14 times as likely to be represented as disadvantaged students suggests that selective universities are not vigorously pursuing race-neutral alternatives as required by *Fisher v. University of Texas*. The Court held in *Fisher* that in pursuing the compelling goal of diversity, universities bear "the ultimate burden of demonstrating, before turning to racial classifications, that available workable race-neutral alternatives do not suffice."[22] Yet it appears that universities instead are using race as a first resort.

Indeed, the *Fisher* decision itself has appeared to yield little change in behavior by colleges and universities. A 2013 *Inside Higher Ed* poll of admissions officers, for example, found that only 1 percent of public and private institutions were "very likely" to change policies after *Fisher*. Only 4 percent of public and 8 percent of private institutions were "somewhat likely" to change.[23] Likewise, a 2015 report of the American Council on Education found that in a survey of college officials, "when asked directly whether the *Fisher* ruling affected their admissions or enrollment management practices, only 13 percent of institutions responded in the affirmative."[24]

It is not hard to understand why universities, when given the option of using racial preferences to

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[22] 113 S.Ct. 2411, 2420 (2013).

[23] *Feeling the Heat: the 2013 Survey of College and University Admissions Directors*, INSIDE HIGHER ED, Sept. 18, 2013.

[24] LORELLE L. ESPINOSA, MATTHEW N. GAERTNER, & GARY ORFIELD, RACE, CLASS AND COLLEGE ACCESS: ACHIEVING DIVERSITY IN A SHIFTING LEGAL LANDSCAPE 32 (American Council on Education, 2015).

recruit upper-middle class minority students, do that instead of using race-neutral alternatives that involve recruiting economically disadvantaged students of all races. A lack of racial diversity is more visible to the naked eye than a lack of socioeconomic diversity. And minority groups may be better politically organized than economically disadvantaged families in seeking representation.

Most importantly, universities compete on prestige, and pursuing socioeconomic diversity as a race-neutral strategy takes resources away from spending that will increase an institution's rankings in guides put out by organizations such as *U.S. News & World Report*. "Think about the incentives," says Vassar President Catharine Hill. "Every dollar you use for financial aid could have been used otherwise to improve your ranking. Spending on every other thing ups your score."[25] Compared to the hard work of addressing deeply rooted inequalities, racial preferences provide what Yale Law professor Stephen Carter has called "racial justice on the cheap."[26]

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[25] Emily Bazelon, *Selective colleges are shockingly bad at recruiting poor kids of all races*, SLATE, June 25, 2013.

[26] Stephen L. Carter, *Affirmative Distraction*, N.Y. TIMES, July 6, 2008.

II. When Racial Preferences Are Banned, Universities Have Devised a Series of Race-Neutral Strategies That Are Effective in Producing Combined Levels of Racial, Ethnic, and Socioeconomic Diversity That Are Generally Higher Than Those Achieved Using Racial Preferences.

For years, supporters of affirmative action argued that no workable alternatives existed for creating racial diversity. In the words of Justice Blackmun's opinion in the 1978 *Bakke* case: "I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way."[27]

Since then, however, numerous universities have in fact found other ways. Several states—educating 29 percent of the national high school population—have banned racial affirmative action at public universities and have devised creative new approaches to achieving diversity.[28]

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[27] 438 U.S. 265, 407 (1978) (Blackmun, J.).

[28] Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS (Richard D. Kahlenberg ed., 2014).

A. Array of Race-Neutral Alternatives Adopted.

In 2014, The Century Foundation's Halley Potter examined ten states where the use of race was eliminated by voter initiative or other means at leading universities. In these states, several race-neutral strategies have been adopted that can be broken down into six broad categories.[29]

1. Pipeline and Recruitment Efforts.

Six states have spent money to create new partnerships with disadvantaged schools to improve the pipeline of low-income and minority students and boost recruitment. Recruitment is a relatively noncontroversial but reportedly effective way of boosting minority enrollment.[30]

2. Class-Based Affirmative Action.

Eight states have provided new admissions preferences to low-income and working-class students of all races. For example, in California, Richard Sander of UCLA writes, after racial preferences were banned by voters there was a striking "jump in the interest of administrators and faculty in the use of

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[29] *Id.* at 75-90; *see* also ESPINOSA, GAERTNER & ORFIELD, RACE, CLASS AND COLLEGE ACCESS 36, 42 (noting that "The 19 institutions in our study that discontinued the consideration of race subsequently poured their energies into alternative diversity strategies.").

[30] *Id.* at 22.

socioeconomic metrics as an alternative to race in pursuing campus diversity."[31]

3. Financial Aid.

Eight states have expanded financial-aid budgets to support the needs of economically disadvantaged students. For example, in the same year that Nebraska voters banned affirmative action, the Nebraska Board of Regents expanded financial aid offering free tuition to all Nebraska Pell Grant recipients. Likewise, in the years after racial preferences were banned, the University of Florida began offering full scholarships to first generation freshmen from low-income families.[32]

4. Dropping Legacy Preferences.

In three states, individual universities have dropped legacy preferences for the children of alumni. For example, the University of California at Berkeley, UCLA, the University of Georgia, and Texas A&M, after dropping race from consideration, all discontinued the use of legacy preference.[33] This change in admissions policies can have a beneficial impact on racial minorities because legacy preferences disproportionately benefit white

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[31] Richard Sander, *The Use of Socioeconomic Affirmative Action at the University of California*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 99.

[32] Potter, *Transitioning to Race-Neutral Admissions*, *supra*, at 85.

[33] RICHARD KAHLENBERG & HALLEY POTTER, A BETTER AFFIRMATIVE ACTION 26-61 (2012).

students.[34] While conventional wisdom suggests that legacy preferences are a valuable mechanism for raising university funds, careful research finds they have no effect.[35]

5. Percentage Plans.

In three states—Texas, California and Florida—officials created policies to admit students who graduated at the top of their high-school classes. While percentage plans may not easily translate to public or private universities with national pools of applicants, or to graduate programs, important aspects of percentage plans can be applied broadly.[36]

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[34] John Brittain & Eric Bloom, *Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal on Students of Color in College Admissions*, in AFFIRMATIVE ACTION FOR THE RICH 127-32 (Richard D. Kahlenberg ed., 2010).

[35] Chad Coffman, Tara O'Neil, & Brian Starr, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, in AFFIRMATIVE ACTION FOR THE RICH 101-22 (Richard D. Kahlenberg ed., 2010).

[36] First, programs that enhance geographic diversity, and leverage the unfortunate reality of residential and high school segregation by race and class for a positive purpose, can promote integration in higher education. *See* Danielle Allen, *Talent is Everywhere: Using ZIP Codes and Merit to Enhance Diversity*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*. Second, percent plans focus exclusively on class rank by high school GPA, effectively eliminating reliance on SAT and ACT test scores. High school grades are a better predictor of college performance than SAT scores, and have a much less discriminatory impact against minority students. Nearly 850 colleges and universities have already gone "test-optional," including leading institutions such as Bowdoin, Smith, Bates, and Wake Forest. John Brittain & Benjamin Landy, *Reducing Reliance on Testing to Promote Diversity*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*.

6. Community College Transfers.

In two states, stronger programs have been created to facilitate transfer from community colleges to four-year universities to promote diversity. For example, in 1997, in the wake of California's ban on racial preferences, Potter notes, "UC signed a memorandum of understanding with the State of California pledging to increase community college transfer enrollment at UC campuses by a third, and in 1999 UC increased the commitment to a 50 percent increase. In 2008–09, 26.3 percent of new students enrolling in the UC system were transfers from California community colleges."[37] Elite private colleges have also expanded community college transfer programs in order to enhance racial, ethnic, and socioeconomic diversity. From 2006–2010, the Jack Kent Cooke Foundation Community College Transfer Initiative allowed more than 1000 community college students to transfer to eight highly selective four-year institutions—Amherst, Bucknell, Cornell, Mount Holyoke, U.C. Berkeley, the University of Michigan at Ann Arbor, the University of North Carolina at Chapel Hill, and the University of Southern California. [38]

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[37] *See* KAHLENBERG & POTTER, A BETTER AFFIRMATIVE ACTION 35.

[38] Jack Kent Cooke Foundation, *Partnerships that Promote Success* 1, Jan. 2014.

B. These Approaches Are Generally Effective in Promoting Racial/Ethnic Diversity.

How effective were these strategies in promoting racial and ethnic diversity indirectly? In 2012, my colleague Halley Potter and I examined 10 leading universities where race had been banned and found that most succeeded.

1. Seven of Ten Colleges Met or Exceeded Racial Diversity Levels Achieved in the Past Using Racial Preferences.

UT Austin, Texas A&M, the University of Washington, the University of Florida, the University of Georgia, the University of Nebraska, and the University of Arizona used race-neutral alternatives to match or exceed the levels of both African American and Hispanic representation those universities had achieved, before prohibitions went into effect, with race-conscious admissions.[39] Below are three examples.

a. University of Texas

The Texas Top Ten Percent Plan, combined with socioeconomic affirmative action, produced as much—indeed slightly more—racial diversity in 2004 (4.82% African American and 16.21% Hispanic) than the use of race had in 1996 (4.37% African American

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[39] KAHLENBERG & POTTER, A BETTER AFFIRMATIVE ACTION 26-61.

and 15.37% Hispanic).[40] And Texas could do even better on racial diversity if it improved outreach to minority students. Princeton University's Marta Tienda reports that while half of Asian and more than one-third of white Top 10 Percent graduates enroll at one of the public flagships, "just one in four similarly qualified black and Hispanic students" do.[41]

b. University of Washington

In 1998, opponents of affirmative action succeeded in passing an anti-preference initiative in Washington State. Richard McCormick, president of the University of Washington at the time spoke out strongly against the referendum and bemoaned the fact that the proportion of black, Hispanic, and Native American students at the University dropped in the first year after implementation of the ban. But, McCormick and others began to craft new approaches to create diversity. New efforts of recruitment at predominantly minority high schools were launched. Financial aid was expanded, and the university began considering such factors as "personal adversity" and "economic disadvantage." By 2004, "the racial and ethnic diversity of the UW's first-year class had returned to its pre-1999 levels," when race was still

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[40] *Fisher v. Univ. of Tex.*, No. 09-50822, slip op. at 22-23 (5th Cir. July 15, 2014).

[41] Marta Tienda, *Striving for Neutrality: Lessons from Texas in the Aftermath of Hopwood and Fisher*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 94.

considered in admissions, and economic diversity grew as well.[42]

c. University of Georgia

Likewise, in 2000, the University of Georgia, faced with an Eleventh Circuit ruling striking down the use of race in admissions, began shifting emphasis to a number of race-neutral strategies. Nancy McDuff of the University of Georgia, notes that the university added to admissions considerations a number of socioeconomic factors (such as parental education and high school environment), began admitting the valedictorian and salutatorian from every high school class and dropped legacy admissions. Minority enrollment initially dropped after the ban on using race in admission, but it has since moved upward and "the years since 2000 have shown the university moving in the right direction, toward increased racial, ethnic, socioeconomic, linguistic, and geographic diversity on campus."[43]

2. Three Outliers Could Do Better.

In Potter's analysis, three of 10 institutions—the University of California Berkeley and at Los Angeles

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[42] Richard L. McCormick, *Converging Perils to College Access for Racial Minorities: Examples of Responses that Work from Washington State and New Jersey*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*.

[43] Nancy G. McDuff & Halley Potter, *Ensuring Diversity Under Race-Neutral Admissions at the University of Georgia*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*.

and the University of Michigan at Ann Arbor—were not able to sustain prior levels of racial and ethnic diversity using race-neutral alternatives, a point that Justice Sotomayor noted in her dissent in *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary (BAMN).*[44]

These results, however, do not suggest more broadly that race-neutral strategies are ineffective. To begin with, Michigan has taken only modest steps to increase socioeconomic (and thereby racial) diversity. Michigan still gives preferences in admission to the children of alumni, and still provides substantial "merit" aid to wealthy students, thereby diverting funds from need-based aid. In all, only 15 percent of Michigan students are eligible for federal Pell Grants, compared with more than 25 percent at public flagship universities nationally.[45] Moreover, the data on black enrollment at Michigan cited by Justice Sotomayor is problematic. In 2010 the U.S. Department of Education changed its methodology for categorizing students by race and ethnicity, requiring colleges to report separately students who are members of two or more races. "So a drop in the number of black students reported at a university from 2009 to 2010," one observer noted, "doesn't *necessarily* mean that there were actually fewer black students."[46]

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[44] 134 S.Ct. 1623, 1677-1682 (2014) (Sotomayor, J., dissenting).

[45] Richard D. Kahlenberg, *A Fresh Chance to Reign in Racial Preferences*, WALL ST. J., Oct. 13, 2013.

[46] Jonah Newman, *What Does the Education Dept. Know About Race?*, CHRON. OF HIGHER EDUC., Apr. 28, 2014.

At the University of California, meanwhile, using better measures of socioeconomic disadvantage, such as wealth or net worth, would likely produce higher levels of African American and Latino representation than UC Berkeley and UCLA currently do with their focus on income.[47] Moreover, on the all-important metric of bachelor's degree attainment, Richard Sander's research suggests that because African American students are currently better matched within the UC system, overall black graduation numbers have *increased* following the adoption of the ban on racial preferences. Despite an initial drop in black enrollment within the UC system, average African American bachelor's degree attainment rose from 802 (from 1997 to 2003, the last cohorts generally admitted through racial preferences) to 926 in the post-ban years, 2004–2009.[48]

3. Research suggests under a uniform rule of racial blindness, universities could produce high levels of racial, ethnic, and socioeconomic diversity.

What would happen at selective universities if a uniform rule of race neutrality were adopted? Early research, including a 1998 study looking narrowly at *income-based* affirmative action, suggested that racial diversity would decline, as the Fifth Circuit noted in

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[47] *See* discussion, *infra*.

[48] Richard Sander, *The Use of Socioeconomic Affirmative Action*, *supra*, at 102-03.

its opinion.[49] But more recent research which examines a variety of socioeconomic factors—including wealth and neighborhood poverty levels—can produce substantial racial and ethnic diversity. Below are two examples.

a. University of Colorado

Scholar Matthew Gaertner reports that a sophisticated socioeconomic affirmative action plan at the University of Colorado at Boulder that gives considerable weight to economic disadvantage could achieve even more racial diversity than using race per se. When simulations were run, socioeconomic diversity increased, as expected, but surprisingly, the acceptance rates of underrepresented minority applicants also increased, from 56 percent under race-based admissions to 64 percent under class-based admissions, perhaps because of the size of the preference provided. Gartner found that the class-based admits were about as likely to graduate in six years as underrepresented minorities at Colorado.[50]

b. National Research

Taking a national perspective, in 2014, Anthony Carnevale, Stephen Rose, and Jeff Strohl of Georgetown University looked at how socioeconomic affirmative action programs, and percentage plans, could work at the nation's most selective 193

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[49] Op. at 34-34.

[50] Matthew Gaertner, *Advancing College Access with Class-Based Affirmative Action: The Colorado Case*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 181.

institutions.[51] The authors find that combined black and Latino representation under our current system of race-based affirmative action, legacy preferences, athletic preferences and the like is 11% at the most selective 193 institutions. That would drop to 5% if test scores were the sole basis of admissions. Under a program of class-based affirmative action using a mix of socioeconomic considerations (such as parental education, income, and savings—a proxy for wealth—and school poverty concentrations), the combined African American and Hispanic representation would rise to 13%. Under a simulation in which the top 10% of test takers in every high school was among the pool admitted, combined black and Hispanic representation would rise to 17%. Under each of these scenarios, socioeconomic diversity and mean SAT scores would also rise.[52]

C. Alternatives Produce Greater Levels of Socioeconomic Diversity.

Universities tend to measure the effectiveness of race-neutral alternatives exclusively in terms of

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[51] Anthony P. Carnevale, Stephen J. Rose, & Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 192.

[52] The breakdown is as follows: Status quo (4% African American, 7% Hispanic; 14 percent from the bottom socioeconomic half; 1230 mean SAT); Admissions by test score (1% African American, 4% Hispanic; 15% bottom socioeconomic half; 1362 mean SAT); Socioeconomic affirmative action (3% African American, 10% Hispanic, 46% from bottom socioeconomic half, 1322 mean SAT); Top 10% of test takers from every high school (6% African American, 11 percent Hispanic, 31 percent from bottom socioeconomic half, 1254 mean SAT).

the racial diversity produced, but if one is examining the overall educational benefits of diversity, a better metric is the effect on socioeconomic and racial diversity taken together. Not surprisingly, race-neutral alternatives that focus on socioeconomic disadvantage or geography produce much higher levels of socioeconomic diversity than do racial preferences. This is true, both in simulations like Gaertner's and Carnevale's, and in real-life programs implemented in states like California and Texas.[53]

For example, when UCLA Law School adopted a socioeconomic affirmative action program, Richard Sander reports, the proportion of students who were the first in their families to attend college roughly tripled.[54] Likewise, the Texas Top Ten Percent Plan produced substantial socioeconomic diversity. Roughly three-quarters of students are admitted through the percentage plan, and one-quarter through discretionary admissions (which, after 2004, began to include race again). In 2013, 21% of incoming students admitted through the percent plan were from families making less than $40,000, compared with 6% of those admitted under discretionary admissions.[55]

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[53] *See* Gaertner, *supra*, at 181, Table 14.3; Carnevale, Rose & Strohl, *supra*, at 192, Table 15.2.

[54] Sander, *The Use of Socioeconomic Affirmative Action*, *supra*, at 105.

[55] William Powers, The University of Texas at Austin: Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, at 30 (Dec. 20, 2013).

D. Responding to Critics Who Say Socioeconomic Diversity Is Problematic.

Critics complain that programs that increase socioeconomic diversity—along with racial diversity—are problematic on two grounds: they admit too few privileged minority students; and they are too expensive to be "workable" race-neutral alternatives.

1. The Argument for "Diversity within Diversity" Is Flawed.

The Fifth Circuit panel oddly turned the success of Texas Top Ten Percent plan in producing socioeconomic and racial diversity on its head by faulting the program for not admitting more privileged students of color who attend more affluent integrated high schools and could serve as bridge-builders between races.[56] The contention is related to an argument advanced earlier by Texas that because the percentage plan admitted many minority students who were "the first in their families to attend college," preferences are needed to admit students such as "the African American or Hispanic child of successful professionals in Dallas" who would defy stereotypes.[57] These arguments are problematic for several reasons.

First, privileged minority students are hardly absent on selective campuses where roughly nine in ten black students are middle or upper class.[58] Even

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[56] Op. at 29.

[57] Brief for Respondents, *Fisher v. Univ. of Tex.*, at 33-34.

[58] BOWEN & BOK, THE SHAPE OF THE RIVER, *supra*, at 341.

in the absence of race-based affirmative action, national research suggests that if academic indicators (such as test scores and grades) were the sole basis for admissions, roughly one-third of the current population of African American and Latino students would be admitted.[59] Furthermore, those from privileged backgrounds are most likely to qualify without consideration of race because within every racial group, the highest test takers tend to be the most affluent.

Second, if universities are specifically seeking students who are bridge-builders, racial preferences for privileged students of color are an unnecessary and blunt instrument. Instead, students of all races who have demonstrated that in the past they have been leaders in fostering interracial dialogue could receive special consideration. Indeed, there is evidence that because low-income whites have greater experience interacting with minority students in high school, they are more likely to engage across race in college,[60] yet research suggests that universities provide no boost to disadvantaged whites, controlling for other factors.[61]

Third, it is relevant to note that the argument for racial preferences on behalf of privileged students

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[59] Carnevale & Rose, *supra*, at 142; Carnevale Rose, & Strohl, *supra*, at 194-95.

[60] Julie J. Park, Nida Denson, & Nicholas A. Bowman, *Does Socioeconomic Diversity Make a Difference? Examining the Effect of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 AM. EDUC. RESEARCH J. 466, 471, 473, 475-76 (2013).

[61] ESPENSHADE & RADFORD, NO LONGER SEPARATE, *supra*, at 98, Figure 3.9.

of color is precisely the opposite of the race-blind class-based approach advocated by Dr. Martin Luther King Jr. In his 1964 book *Why We Can't Wait*, King wrote that compensation is due to black Americans.[62] But instead of urging adoption of a program for blacks, as some civil rights leaders had done, King called for a color-blind Bill of Rights for the Disadvantaged. The program would disproportionately benefit black Americans, but King wrote, "It is a simple matter of justice that America, in dealing creatively with the task of raising the Negro from backwardness, should also be rescuing a large stratum of the forgotten white poor."[63]

2. Providing More Students of Modest Means Access to Higher Education Through Race-Neutral Alternatives Would Be More Expensive Than Giving Racial Preferences to Privileged Students of Color, But That Does Not Make the Plans "Unworkable."

Programs aimed at providing access to bright students with few families resources will be more expensive for colleges and universities, but racial preferences cannot be justified on the basis that they are a cheaper option. As attorneys Arthur Coleman and Teresa Taylor note, this Court has often rejected cost as a rationale for abrogating rights when applying the strict scrutiny test. In *Saenz v. Roe*

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[62] MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 134 (1964).
[63] *Id.* at 137-38.

(1999),[64] for example, the Court rejected the argument that California could impinge on the right to travel by reducing welfare benefits to those who were new to the state. The state said the rule saved taxpayers $10 million per year, but the Court ruled: "the state's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens."[65] Coleman and Taylor write: "an institution should not assume that cost savings alone can justify the ongoing use of a race-conscious policy."[66]

Indeed, the Obama Administration's chief of civil rights at the U.S. Department of Education, Catherine Lhamon, has argued that given *Fisher*'s requirement to pursue workable race-neutral alternatives, it would be difficult for a university to argue that a strategy is unworkable for financial reasons if the institution devoted resources to non-need merit aid that could be shifted to need-based aid.[67]

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[64] 526 U.S. 489 (1999).

[65] Arthur L. Coleman & Teresa E. Taylor, *Emphasis Added: Fisher v. University of Texas and Its Practical Implications for Institutions of Higher Education*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 243 n.29.

[66] *Id.* at 52.

[67] Catherine Lhamon, *Lumina Ideas Summit* (June 17, 2014), *available at http://www.luminafoundation.org/news-and-events/ideas-summit.*

III. RACE-NEUTRAL STRATEGIES ARE NOT OBLIVIOUS TO THE WAYS IN WHICH RACE CONTINUES TO MATTER IN AMERICAN SOCIETY.

Well-crafted race-neutral alternatives, while not providing a blanket preference by race, are nevertheless cognizant of the ways in which past and present racial discrimination shapes opportunities in America.

In *Schuette*, Justice Sotomayor eloquently outlined the ways in which race matters in American society and concluded that racial preferences were a necessary response.[68] Likewise, the Fifth Circuit criticized socioeconomic affirmative action programs as flawed because they "conclude that skin color is no longer an index of prejudice."[69]

In fact, however, socioeconomic alternatives work to produce racial diversity precisely because economic disadvantage is often shaped by racial discrimination. Indeed, research finds that when socioeconomic affirmative action programs are constructed using a wide variety of variables—not just parental income, but highly racialized factors such as wealth/net worth, and neighborhood and school levels of poverty—they can produce substantial racial and ethnic diversity, precisely because this wider array of socioeconomic factors better captures the economic impact of ongoing and past racial discrimination than does income (or race) alone.

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[68] 134 S.Ct. at 1676 (Sotomayor, J., dissenting).

[69] Op. at 35.

A. Wealth Is Highly Racialized.

New York University's Dalton Conley finds that wealth, because it is handed down from generation to generation, better reflects the nation's legacy of slavery and segregation than does income.[70] Black Americans typically have incomes that are 70% of white incomes, but black wealth is just 10% of white wealth.[71]

Having said that, using wealth in admissions is not just a clever ruse for considering race. Parental wealth and education are far more powerful predictors of college completion than race or income, Conley finds.[72] Wealth matters more than income, Conley notes, because "educational advantages are acquired through major capital investments/decisions," such as purchasing a home in a neighborhood with good public schools.

B. Concentrated Poverty Is Highly Racialized.

Growing up in concentrated poverty also imposes disadvantages on children, so as a matter of fairness it should be considered in admissions. And because it is highly racialized, it will capture the effects of discrimination in the housing market, where black and Hispanic families with incomes in excess of $75,000 live in neighborhoods with higher poverty rates than white families earning less than

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[70] Dalton Conley, *The Why, What, and How of Class-Based Admissions Policy*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 209.

[71] *Id.*

[72] *Id.* at 206.

$40,000.[73] Plans that give a preference to students growing up in concentrated poverty will acknowledge the extra burden that, in the aggregate, poor black children face much more often than poor white children.

C. Racialized Economic Indicators Are Not Crude Proxies But Better Targeted Tools Than Racial Preferences.

On the flip side, some criticize race-neutral alternatives such as percentage plans or socioeconomic affirmative action as subterfuges that seek a desired racial result covertly. But this thinking has it exactly backwards because the beneficiaries are a very different subset of black and Latino students than those who usually benefit from affirmative action. The new beneficiaries are more likely to be working-class and the actual victims of segregation. As Sheryll Cashin notes, place-based approaches help "those who are actually disadvantaged by structural barriers" rather than enabling "high-income blacks to claim the legacy of American apartheid."[74]

IV. WELL-CRAFTED RACE-NEUTRAL STRATEGIES DO NOT COMPROMISE ACADEMIC QUALITY.

While some fault race-neutral alternatives for reducing academic standards, research refutes that

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[73] JOHN R. LOGAN, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA, US2010 Project, at 5 (July 2011).

[74] CASHIN, PLACE NOT RACE, *supra*, at 78.

claim. For example, the Fifth Circuit panel suggested that the Top Ten Percent plan is flawed because it admits students with "lower standardized test scores."[75] Higher scores, the panel suggests, "predict[ ] . . . higher levels of . . . graduation."[76] But nowhere does the panel point to negative academic consequences associated with the percentage plan in practice. In fact, in 2000, UT's president noted that "minority students earned higher grade point averages last year than in 1996 and have higher retention rates."[77] Moreover, careful research by Sunny Niu and Marta Tienda of Princeton University found that between 1993 and 2003, black and Hispanic students admitted through the percentage plan "consistently perform as well or better" than white students ranked at or below the third decile.[78]

Likewise, in a national simulation, Carnevale and Rose found that top 146 institutions could nearly quadruple the proportion of students from the bottom socioeconomic half (from 10% of all students, the level they found in their research, to 38%) without any change in graduation rates.[79]

These studies are buttressed by a growing body of research on "undermatching"—in which highly qualified students do not apply to selective colleges.

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[75] Op. at 23-24.

[76] Op. at 29.

[77] Larry Faulkner, *The "Top Ten Percent Law" Is Working for Texas* (Oct. 19, 2000).

[78] Sunny X. Niu & Marta Tienda, *Minority Student Academic Performance under the Uniform Admission Law: Evidence from the University of Texas at Austin*, 44 EDUC. EVALUATION & POL'Y ANALYSIS 32 (2010).

[79] Carnevale & Rose, *supra*, at 148-49.

Alexandria Walton Radford and Jessica Howell note that 43 percent of students who are academically qualified to gain admission to selective colleges undermatch, and that many are Hispanic and African American.[80] Likewise, Caroline Hoxby of Stanford and Christopher Avery of Harvard find that 35,000 low-income students are very high achieving, and that only one-third apply to one of the country's 238 most selective colleges. Of those low-income high-achieving students, roughly 2000 are African American and 2700 Hispanic.[81] To put these numbers in context, at Barron's top tier of selective schools (about 80 institutions), there are currently only 5400 black freshmen and 9700 Hispanic freshman from all economic backgrounds. This research suggests there is enormous potential to increase socioeconomic and racial diversity without in any way sacrificing academic quality if colleges recruit high achieving low-income students the way they do athletes.

CONCLUSION

We have advanced far beyond the day when universities could claim there was "no other way" to achieve diversity short of racial preferences. Texas has found a way, as has Washington, Georgia, Florida and several other states. We now have a wealth of experience and empirical research on race-neutral

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[80] Alexandria Radford & Jessica Howell, *Addressing Undermatch: Creating Opportunity and Social Mobility*, in THE FUTURE OF AFFIRMATIVE ACTION, *supra*, at 134.

[81] Caroline M. Hoxby & Christopher Avery, *The Missing 'One-Offs': The Hidden Supply of High-Achieving, Low Income Students*, NBER Working Paper No. 18586, Dec. 2012.

strategies that suggests that they do a better job than racial preferences of producing meaningful levels of racial, ethnic, and socioeconomic diversity.

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September 10, 2015